Nos. 82-185, 82-246, 82-259

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner,*

—v.—

BOSTON CHAPTER, NAACP, INC., ET AL., *Respondents.*

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., *Petitioner,*

—v.—

PEDRO CASTRO, ET AL., *Respondents.*

NANCY B. BEECHER, ET AL., *Petitioners,*

—v.—

BOSTON CHAPTER, NAACP, INC., ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ORGANIZATION FOR WOMEN; EQUAL RIGHTS ADVOCATES, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; NATIONAL WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S DIVISION, NATIONAL BAR ASSOCIATION; WOMEN'S EQUITY ACTION LEAGUE; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST OF AMICI CURIAE

This brief amicus curiae in support of respondents is submitted on behalf of the National Organization for Women; Equal Rights Advocates, Inc.; League of Women Voters of the United States; National Women's Law Center; Women Employed; Women's Division of the National Bar Association; Women's Equity Action League; and Women's Legal Defense Fund.*/ These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment.**/ Amici believe that the cases before the Court are of great importance to the ability of the federal courts to provide effective remedies for employment discrimination.

*/Letters from counsel for all parties, consenting to the filing of this brief, are being filed with the Clerk.

**/Statements describing each organization appear in the Appendix to this brief.

SUMMARY OF ARGUMENT

The petitioners in these cases ask the Court to subordinate judicially-supervised remedial orders to a seniority-based layoff plan which threatened to wipe out the progress made, pursuant to court order in the 1970's, toward racial integration of Boston's Police and Fire Departments. However, these cases are moot, because today all the laid off personnel are back at their jobs, thereby resolving the problem brought to the lower courts--the manner in which to implement the layoffs. None of the collateral claims asserted by petitioners suffices to transform these cases into a live controversy.

Permitting the operation of a seniority-based layoff plan to override remedies for discrimination interferes substantially with the ability of women of all races and ethnic groups to achieve economic self-

sufficiency. One of the most significant current demographic trends is the dramatic increase in the poverty of women and their children. Institutionalized sex discrimination contributes to this trend and confines women to low-status, low paying jobs.

Systematic exclusion of women from employment in the protective services has been judicially acknowledged, and courts have acted to remedy the effects of this discrimination. The ability of the federal courts to protect the effectiveness of their remedial decrees, at issue in the instant cases, directly affects the ability of all women to obtain and maintain employment in state and local governments.

The national policy to eliminate discrimination is clear, both under the Constitution and through Congressional legislation. However, despite enactment of various statutes prohibiting employment

discrimination, minorities and women are still struggling to achieve equality. In addition to hiring barriers, the "last hired, first fired" practice for structuring layoffs disproportionately affects women and minorities in a way that can eviscerate the modest progress made to date in integrating the work force.

This Court has recognized the strong remedial powers of the courts in effectuating anti-discrimination guarantees. The lower courts herein properly acted to preserve the effectiveness of their remedial decrees by temporarily suspending operation of a seniority-based layoff plan. The race-conscious nature of the remedy below is necessary and appropriate to achieve the goal of eliminating discrimination.

ARGUMENT

POINT I

THESE CASES ARE MOOT

These cases come to this Court on petitions to review orders of the district court mandating certain procedures to govern the layoffs of police and fire department personnel in the city of Boston during the summer of 1981. At the time the order was entered, the city was in the midst of a program to lay off over 13% of its police officers and over 12% of its firefighters. Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 970 (1st Cir. 1982) (hereinafter, Boston NAACP).[1/] Today, however, all the

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[1/] Had the layoffs been carried out as originally proposed, they would have resulted in the layoff of 54.5% of the Black and Hispanic police officers, and 45.6% of the Black and Hispanic firefighters. Boston NAACP, 679 F.2d at 970. The number of firefighters actually laid off was greater than projected--almost 15% of the force. Petition for Writ of Certiorari, Boston Firefighters Union, Local 718, at 7.

laid off personnel are back at their jobs, Brief of Petitioner, Boston Police Patrolmen's Assoc. at 6 n.1 (hereinafter, "Police Br."). Further, the Massachusetts legislature has mandated that no person laid off in the summer 1981 wave of layoffs can in the future be laid off due to lack of funds. 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.). The problem that caused the entry of the disputed order was how to carry out the layoffs the city had decided to put into effect. That problem has been resolved, and resolved in a way that will prevent its recurrence. These cases, therefore, are moot.

This Court has consistently held that the "rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed [citations omitted]." Steffel v. Thompson, 415 U.S. 452, 459

n.10 (1974). The fact that a case presented a live controversy at an earlier stage does not in itself assure that it will still be live at a later stage. See, e.g., Golden v. Zwickler, 394 U.S. 103 (1969). The fact that the requirement of a live controversy is rooted in Article III of the Constitution means, as the Court has often noted, that it is simply without power to adjudicate moot cases. See, e.g., North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (collecting cases); Richardson v. Ramirez, 418 U.S. 24, 36 (1974); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). In the instant cases, the controversy that existed in August, 1981 has since been resolved in forums other than the federal courts, leaving no issues for this Court.

The Court has recognized that there

are circumstances in which potentially mooting conditions do not operate to deprive the courts of jurisdiction under Art. III. This includes the circumstance in which the event complained of is "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973). The "voluntary cessation of allegedly illegal conduct... does not make [a] case moot." United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). Additionally, the presentation of a case as a class action under Rule 23, Fed.R.Civ.P., can allow the case to continue after the individual claims of the named plaintiffs have expired. Compare Sosna v. Iowa, 419 U.S. 393 (1975); with DeFunis v. Odegaard, 416 U.S. at 317.

The instant cases, however, fit in

none of these categories. The possibility that there will be other fiscally motivated layoffs of short, and therefore unreviewable, duration, has been effectively foreclosed by the Massachusetts legislature, 1982 Mass. Adv. Legis. Serv. ch. 190 (Law. Co-op.), which has also removed any aspect of "voluntariness" from the case. Since the parties before the court (or their members) constitute everyone who could possibly have a claim in this litigation,[2/] there can be no unnamed individuals with live claims despite the fact that the named parties' claims are moot.

[2/] Neither the Boston Police Commission nor the Boston Fire Commissioner, defendants in the litigation, appealed the district court's order to the First Circuit. Boston NAACP, 679 F.2d at 971.

Petitioners, as well as the United States as amicus curiae, nevertheless advance several hypotheses about why these cases are not moot. None of these suggestions can withstand analysis under this Court's precedents. On inspection, these suggestions fall into two categories: those that are speculative, see DeFunis v. Odegaard, 416 U.S. at 320 n.5, and those that in reality seek an advisory opinion from this Court. See Flast v. Cohen, 392 U.S. 83, 96 (1968).

The state petitioners speculate that "the provisions of Mass. St. 1980, c.580 ('Proposition 2 1/2')...may require an additional round of layoffs in many municipalities" other than Boston, and that the instant cases should therefore be decided on the merits. Petition for Writ of Certiorari at 23 n.9. The possibility of

future layoffs in some other city is hardly reason for this Court to adjudicate a dispute about past layoffs in Boston. This potential scenario lacks the "immediacy and reality" of a controversy, Golden v. Zwickler, 394 U.S. at 109, necessary to sustain Art. III jurisdiction.

The police union hypothesizes that "interruptions of [more senior, but laid off, white officers'] employment may defer their eligibility for promotional examinations." Police Br. at 6 n.1. It presents no facts to show that any officers have suffered--or are even likely to suffer--the alleged delay in promotional opportunity. Massachusetts law, however, provides that civil service personnel laid off for fiscal reasons do not lose any time of service for purposes of calculating their seniority. Mass. Ann.

Laws ch. 31, §33 (Law. Co-op. 1982 Supp.). Thus, it is difficult to see how the alleged harm could come about.[3/]

The cited statutory section does not merely preserve laid-off workers' seniority rights. It maintains the seniority of all employees, white and minority, in the same relation that existed before the entry of the district court's order. Thus, the parties today are in the identical positions, with respect to each other, that they held in June, 1981, before any layoffs took place. There is simply no current controversy between

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[3/] Moreover, the language of ch. 31 §33 that "continuity of service...shall be deemed not to have been interrupted..." if the employee was laid off for fiscal reasons, assures that the employee does not lose any time to be counted toward the statutory time-in-grade requirement for taking a promotional examination. Mass. Ann. Laws ch. 31, §59 (Law. Co-op. 1982 Supp.).

them.

An actual controversy between the parties to this litigation is not created by the suggestion of the United States that the loss of pay suffered by the laid off employees gives them a personal stake in the outcome of the case that is sufficient to render the case not moot. Brief of U.S. as amicus curiae at 9n. Although a party's personal stake[4/] in the outcome

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[4/] The need for a significant personal stake in the outcome has been developed most fully in the Court's decisions on standing. See, e.g., Baker v. Carr, 369 U.S. 186, 204 (1962); Flast v. Cohen, 392 U.S. at 99; Warth v. Seldin, 422 U.S. 490, 498-501 (1975). The requisites of standing are also relevant to the mootness inquiry, since mootness can be seen as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973), quoted in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980).

of the case is necessary for finding that a case is not moot, it is not sufficient. The reason for the personal stake requirement is "to assure that concrete adverseness...", Baker v. Carr, 369 U.S. 186, 204 necessary to the proper litigation of cases. While the allegation of loss of pay is superficially plausible, cf. Powell v. McCormack, 395 U.S. 486, 496 (1969), in the context of the instant cases it does not suffice to create a live controversy for decision by this Court.

The claim fails at the most basic level because there is no adverse interest represented in this case. In view of the statutory prohibition on future fiscally motivated layoffs, 1982 Mass. Adv. Legis. Serv., ch. 190, §25 (Law. Co-op.), respondents have no interest whatsoever in whether or not previously laid off white workers receive pay for their time of layoff, since

the resolution of that issue can have no effect on the employment status of Black and Hispanic members of the classes represented by respondents.[5/] As Justice Powell has pointed out, jurisdiction under Art. III requires that the party claiming injury make "a nonfrivolous showing of continuing or threatened injury at the hands of the adversary." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 412

[5/] This is an important distinction between the instant cases and many of this Court's prior decisions. In the Court's previous mootness inquiries, the parties have typically been a governmental agency on one side, and a private party claiming injury, on the other. The continuing interest of the government agency in the administration of its statutes or rules provided one side of the controversy; the claimed injury to the private party provided the other. See, e.g., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974) ("fixed and definite" policy of state government); Roe v. Wade, 410 U.S. 113 (1973) (state criminal statute); Sosna v. Iowa, 419 U.S. 393 (1975) (state residency requirement); Sibron v. New York, 392 U.S. 40 (1968) (state criminal statute). Here, by contrast, respondents have no ongoing interest in, much less responsibility for, the claimed injury asserted by some petitioners.

(1980) (Powell, J., dissenting) (emphasis added). Regardless of whether the claim of denial of pay provides the injury, these cases do not provide the adversary.

Indeed, a close look at the asserted back pay claim reveals that the adversaries are all to be found in the petitioners' camp. On one side are some of the members of the petitioner unions, and on the other is the Civil Service Commission, which is charged with the responsibility for hearing appeals of "person[s] aggrieved by a decision of an appointing authority." Mass. Ann. Laws ch. 31, §43 (Law. Co-op. 1982 Supp.). The back pay issue, if it exists, is a matter to be resolved in the first instance by the Massachusetts civil service review system, Mass. Ann. Laws ch. 31, §§39-44 (Law. Co-op. 1982 Supp.) (providing, inter alia, for judicial review of Civil Service Commission decisions), not

by this Court.[6/]

[6/] The contention of the United States that the district court's order has foreclosed the normal route of civil service appeals, Br. at 9n, is not persuasive. The order enjoined the state petitioners from "disapproving, invalidating or interfering with the termination" of any police or fire employees who challenged their layoffs. Castro v. Beecher, 522 F.Supp. 873, 878, 879 (D.Mass. 1981) (emphasis added). The order, appropriately, did not attempt to control any actions to be taken with respect to any possible ancillary questions about the layoffs, such as those now raised by petitioners, since the controversy before the district court only concerned the implementation of the layoffs themselves. The United States presents no facts to suggest that the district court's order has prevented or will prevent the Civil Service Commission from exercising its authority, in deciding an appeal, to "modify any penalty imposed by the appointing authority." Mass. Ann. Laws ch. 31, §43 (Law. Co-op. 1982 Supp.). Indeed, the Civil Service Commission whose authority has allegedly been compromised, has not raised this issue.

The related contention that the injunction issued below permanently enjoins the police and fire departments from laying off employees in a way that reduces minority representation below a specified level (U.S. Br. at 9n), and thus presents an ongoing controversy, is based on a misreading of the district court's decision. The requested modification of the consent de-

footnote continued

footnote continued

crees was found by the district court, and the finding was affirmed by the court of appeals, to be the result of the initial response of the municipal authorities to Proposition 2 1/2. Castro v. Beecher, 522 F.Supp. at 877; Boston NAACP, 679 F.2d at 972. The trial court's finding of fact clearly refers to the issue in the litigation as the "reductions in force now being conducted, and scheduled for completion on August 18, 1981," Castro v. Beecher, 522 F.Supp. at 876. The order was intended to address the "new and unforeseen conditions," id. at 877, presented by the lay-off program, and unmistakably does address that problem. To the extent that there is any possibility of interpreting the order as extending beyond the summer, 1981 situation, it is nevertheless rendered superfluous by the mandate imposed by the Massachusetts legislature. 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.).

In essence therefore, petitioners and amicus are asking this Court to render an advisory opinion on litigation that is not before it: monetary claims that some members of petitioner unions may be pursuing through the civil service procedures administered by the state petitioners. That may be a live controversy, but it is not the controversy in this litigation.[7/]

In sum, the controversy that brought these parties into court no longer exists. Nothing this Court decides about the merits of this case will "[touch] the legal re-

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[7/] The mere existence of a spirited dispute between the parties on the merits of the case does not in itself confer Art. III jurisdiction. See, e.g., Richardson v. Ramirez, 418 U.S. at 35-36; Hall v. Beals, 396 U.S. 45, 48-49 (1969) (per curiam); United States Parole Comm'n v. Geraghty, 445 U.S. at 421 n.16 (Powell, J., dissenting). Cf. Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam) (emotional involvement in case does not create live controversy).

lations of parties having adverse legal interests." North Carolina v. Rice, 404 U.S. at 246, quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). These cases should, therefore, be dismissed as moot.[8/]

In the event that the Court concludes that these cases are not moot, amici submit that the decision of the court of appeals should be affirmed, for the reasons set forth in Points II and III, infra.

[8/] In the alternative, amici respectfully suggest that the Court remand these cases for a determination of whether petitioners' allegations of continuing injury are well-founded, and whether the cases are moot. See, e.g., Steffel v. Thompson, 415 U.S. 452 (1974); Spomer v. Littleton, 414 U.S. 514 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973); Scott v. Kentucky Parole Board, 429 U.S. 60 (1976).

Point II

THESE CASES RAISE ISSUES HAVING A SIGNIFICANT IMPACT ON WOMEN'S OPPORTUNITIES TO BECOME ECONOMICALLY SELF-SUFFICIENT

The desperate economic position of women in our society--and growing poverty of women and children generally--is today widely acknowledged. See, e.g., Nat'l Advisory Council on Economic Opportunity. Critical Choices for the 80's (1980) [hereinafter cited as Critical Choices]; U.S. Comm'n on Civil Rights, Women Still in Poverty (1979). Nearly one-third of all female-headed households are living below the poverty line, while only one in 18 male-headed households finds itself in a similar position. Critical Choices at 17.[9/]

[9/] Between 1980 and 1981, the number of poor families headed by women increased by 231,000, Bureau of the Census, U.S. Dept. of Commerce, Money Income and Poverty Status of Families and Persons in the United States: 1981 (Advance Data from the March, 1982 Current Population Survey) 3, Table B. (1982).

In 1980, families maintained by women alone had the lowest median annual income of all families. Bureau of the Census, U.S. Dept. of Commerce, Characteristics of Households and Persons Receiving Selected Non-Cash Benefits: 1980 9 (1982) [hereinafter, Characteristics].

The situation is particularly grim for women with young children. In 1978, the median income of families headed by women whose children were under six was $4,498, 30% of the median income for all families with children under six, Bureau of the Census, U.S. Dept. of Commerce, Families Maintained by Female Householders 1970-79 36 (1980). The National Advisory Council on Economic Opportunity has estimated that if current demographic trends continue, this nation's impoverished class by the year 2000 will be comprised exclusively of women and children. Critical

Choices at 19.

Among the major factors contributing to the precarious financial position of women are pervasive sex discrimination and job segregation in the workforce. Women comprise 42% of the workforce nationwide. Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 3 Table 1 (1980). Yet, women are concentrated in a small number of occupations which are marked by low pay and limited opportunities. In 1981, half of the 43,000,000 women in the paid labor force were employed in only 20 occupations. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings (March, 1982). While 22% of all men were in three of the major occupation groups (sales, clerical and service), 64% of the women were employed in these occupations. Bureau of the Census, Wage and Salary Data from the Income Survey Development Program:

1979 3 (1982). There is evidence that the occupational segregation of women is increasing. For example, in late 1981 almost 75% of all clerical workers were women, Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 22 Table A-21 (1982), as compared with 62% in 1950. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment in Perspective: Working Women 1 (Report No. 544, 1978).

Further, the wages for "women's jobs" lag behind those categories that are traditionally male jobs. The 1977 weekly wage for 18 of the "women's jobs" ranged from $59 for private household workers to $171 for sewers and stitchers. Bureau of Labor Statistics, U.S. Dept. of Labor, News: Trends in Weekly and Hourly Earnings for Major Labor Force Groups, Tables 1-3 (Nov.2, 1977). In contrast, the 1977

average weekly wage for male-dominated jobs such as construction ($297), transportation and public utilities ($275), and motor vehicle retailers ($208) was far better. U.S. Comm'n on Civil Rights, Women Still in Poverty 19 (1979).[10/]

In view of persistent job segregation and the concomitant wage gap, it is not surprising that the median earnings of women in the paid work force is one half the median earnings of men. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Program: 1979 3, Table 1, pp. 11, 21.

10/ Even within predominantly female occupations, women's wages are significantly below those received by men. On average, a female sales worker, for example, is paid only 52% of wages paid to a male sales worker. Bureau of the Census, U.S. Dept. of Commerce, Money Income of Households, Families, and Persons in the United States: 1980 Table 55 (July, 1982). Female clerical workers receive only 59% of the wages paid to male clerical workers. Id.

The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity. It is only through assuring women truly equal access to jobs that we as a society can reverse these current trends and give women the real possibility of achieving economic self-sufficiency for themselves and their families.

In the instant cases, this Court is presented with some of the consequences of the pervasive history of race discrimination in employment in uniformed municipal services. No less severe, however, has been the systematic exclusion of women of all races from protective services jobs. The effects of the history of sex discrimination in protective services employ-

ment are being remedied very slowly.[11/] The ability of the federal courts to protect their remedial decrees, at issue in these cases, directly affects the ability of all women to obtain and maintain employment in state and local government services.

Women have been effectively barred from police, fire, and similar jobs by a variety of practices. One of the most common policies has been the complete segregation of women within the service, and their confinement to a few low-prestige jobs "appropriate" to their sex.

> [Women] were not permitted to compete with men on [police] entrance examinations. Their eligibility was limited to a relatively few

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11/ In New York City, for example, the qualifying test for firefighters was found to be sex discriminatory in 1982, N.Y. Times, Nov. 6, 1982, at p. 32, col. 5. The first women recruits for the New York City fire department entered training on September 22, 1982. N.Y. Times, Nov. 6, 1982, at p. 29, col. 3.

> positions as 'police women' and 'police matrons'. They were given limited responsibility, primarily for processing, searching and care and custody of women prisoners and a limited amount of youth work. They were not used for patrol work. United States v. City of Chicago, 385 F.Supp. 543, 548 (N.D. Ill. 1974)

Additionally, women have been required to meet stricter educational criteria than men, mandating more years of formal education than men, e.g., Schaefer v. Tannian, 394 F.Supp. 1128, 1130 (E.D. Mich. 1974) (police). Moreover, not only have women been relegated to sex-segregated jobs, some departments have maintained strict quotas on the number of women hired. Id. at 1131. Sex-segregated schedules of entrance examinations have also been maintained, affording women substantially fewer opportunities than men to apply for the handful of positions open to them. Id. at 1130.

As a result of these widespread discriminatory practices, the participation

of women in the uniformed state and municipal services has been extremely low. In 1960, women comprised only 4.1% of all workers in protective service occupations,[12] Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 10, Table 11 (1980). By 1981, the percentage had risen to 10.1%. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982). Since women now constitute more than 42% of the paid labor force, these percentages

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[12] The Bureau of the Census category of "protective service" work includes fire inspection and fire prevention occupations, firefighting occupations, police and detectives, sheriffs, bailiffs and other law enforcement officers, correctional institution officers, crossing guards, guards and police. Bureau of the Census, U.S. Dept. of Commerce, Classified Index of Industries and Occupations XIV (Nov. 1982).

reflect a gross underrepresentation of women.[13/]

Prior to 1972, when Title VII was amended to extend coverage to state and local government employment (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Sec. 701(f), 42 U.S.C. §2000e), women were hardly employed in the protective services at all. They constituted less than 3% of police, less than 5% of guards, and about one-half of one percent of all firefighters in 1972. Bureau of the Census, U.S. Dept. of Commerce, Statistical Ab-

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13/ The percentages of women in these occupations varies dramatically among occupations, although women are substantially underrepresented in all of them. In 1981, women constituted 0.9% of all firefighters, 5.7% of all police officers, 7% of all sheriffs and bailiffs, and 13.7% of all guards. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982).

stracts of the United States: 1981, 420 (1981).[14/]

Not surprisingly, since the enactment of the 1972 amendments, numerous cases alleging sex discrimination in protective services employment have been brought in the federal courts. A sampling of these cases shows a consistent pattern of denial of opportunities to women. In 1974, women constituted slightly over 2% of the police officers in Detroit, Schaefer v. Tannian, 394 F.Supp. at 1130; in 1973, women made up less than 1% of the police officers in Chicago, United States v. City of Chicago, 385 F.Supp. at 548; in 1974, none of the firefighters in 45 Louisiana municipalities and parishes were women, United States v.

14/ Figures for the category of "sheriffs and bailiffs" are not available for this period.

City of Alexandria, 614 F.2d 1358, 1365 n.14 (5th Cir. 1980). In 1979, only 2.3% of the police officers in the cities of Yonkers and White Plains, New York were women, Complaint, United States v. City of Yonkers, 80 Civ. 7407 (S.D.N.Y., 1979), although in 1977 more than 20% of the applicants for officer positions in White Plains were women. Stipulation, id. (April, 1981). In 1977, three out of 91 trainees in the Nassau County, New York police academy were women. Memorandum and Order, United States v. Nassau County Police Dept., No. 76 C1869, at 15 (E.D.N.Y. July 21, 1978).[15/] Women have not been comparably excluded from low-paid, low prestige civilian clerical and support jobs in the state and municipal services. In Nassau County, for example, in 1977 women constituted 0.6% of the sworn

[15/] The other 88 trainess were white men.

police department employees, but 78.9% of the civilian personnel in the department. Id. at 14.

Faced with such clear and dramatic evidence of sex discrimination, the federal courts have found liability and provided for effective relief, including percentage hiring goals. See, e.g., United States v. City of Alexandria, 614 F.2d at 1368 (consent decree covering police and firefighter hiring); Schaefer v. Tannian, 394 F.Supp. at 1135 (order covering police hiring); United States v. City of Buffalo, 633 F.2d 643, 647 (2d Cir. 1980) (order covering police and firefighter hiring); United States v. City of Philadelphia, 499 F.Supp. 1196, 1204 (E.D.Pa. 1980) (injunction covering police hiring). In so doing, the courts have recognized both the importance of opening municipal service employment to women and the necessity of court orders to

assure the initial and continuing availability to women of these fundamentally important employment opportunities. In remedying the effects of sex discrimination, like racial discrimination, rigorous judicial scrutiny and remedial action are the strongest tools to prevent backsliding and solidify the progress already made in the integration of municipal protective services.

POINT III

FEDERAL ANTI-DISCRIMINATION POLICY REQUIRES EFFECTIVE REMEDIES FOR EMPLOYMENT DISCRIMINATION BY GOVERNMENT EMPLOYERS

A. The 1972 Amendments to Title VII of the Civil Rights Act of 1964 Were Enacted to Redress Widespread Employment Discrimination In State and Local Government Employment

This Court has emphatically recognized that the intent of Congress, in enacting Title VII of the Civil Rights Act of 1964, was to "assure equality of employment opportunity and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). See also United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975);

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).[16/] Just over six years after the original Act was passed, Congress in 1972 reaffirmed its commitment to equal employment opportunity for all citizens, by amending Title VII to, inter alia, strengthen the enforcement powers of the Equal Employment Opportunity Commission and extend the provisions of the Act to employees of state and local governments. 86 Stat. 103, Sec. 701(f), 42 U.S.C. §2000e.

Explaining the need for these amend-

16/ The instant cases were brought on two different theories. The case involving the police department, originally Castro v. Beecher, 334 F.Supp. 930 (D.Mass. 1971), alleged violations of 42 U.S.C. §§1981 and 1983. The fire department case, Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507 (D.Mass. 1974) alleged both Title VII and constitutional grounds. Amici will focus their argument on the policy of the elimination of discrimination as expressed in Title VII, and respectfully refer the Court to respondents' brief for a full discussion of the constitutional issues.

ments, the House Report relied on a 1969 U.S. Commission on Civil Rights report [17] which found that "widespread discrimination against minorities exist[ed] in state and local government employment, and that the existence of this discrimination [was] perpetuated by the presence of both institutional and overt discriminatory practices." H.R. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2152.

The House Report further noted that this type of employment discrimination was "particularly acute and had the most deleterious effect," id. at 2153, since it was being practiced in the governmental activities that were "most visible to the minority communities (notably education, law enforcement, and the administration of

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[17] For All The People...By All The People, United States Comm'n on Civil Rights (1969).

justice)...." Id.

The Chairman of the Equal Employment Opportunity Commission voiced a similar concern in testimony before the House regarding the proposed amendments, noting that the "failure of state and local agencies to accord equal employment to their employees is particularly distressing in light of the importance that these agencies play in the daily lives of the local communities...." Equal Employment Opportunities Enforcement Act of 1971, Hearings on S.2515, 2619, H.R. 1746 Before the Subcomm. on Labor of Senate Comm. on Labor & Public Welfare, 92d Cong. (1971).

Nowhere are these concerns more evident or troublesome than in the continuing and almost total exclusion of women and minorities from local police and fire departments--agencies closely identified with

the overall protection of the public, and therefore perhaps the most visible of all.

B. Government Employment Practices, Such As Seniority-Based Lay-Off Plans, Cannot Be Allowed To Frustrate Efforts To Remedy Discrimination.[18]

1. The use of the "last hired-first fired" principle to reduce employment in times of economic recession has a disproportionate impact on minorities and women.

Despite the enactment of federal,

[18] Amici recognize, of course, the immunity afforded bona fide seniority plans under §703(h) of Title VII by this Court's ruling in Teamsters v. United States, 431 U.S. 324 (1977). At issue in these cases, however, is not the lawfulness, under Title VII, of the seniority provisions of the Massachusetts civil service law, Mass. Anno. Laws Ch. 31, §39 (Law. Co-op. 1982 Supp.), but rather the appropriateness, under Title VII remedial principles, of relief which implicates a seniority plan where employment discrimination has been found. Franks v. Bowman, 424 U.S. 747 (1976). It is in this context only that amici urge a temporary restructuring of the "last hired-first fired" principle.

state, and local statutes and presidential orders which prohibit discrimination in employment,[19] equal employment opportunity remains an unrealized goal for many of this country's minority and women workers. For these people, serious barriers to their entrance into the job market continue to exist. Significant among these is the "last hired, first fired" practice for structuring layoffs, which has disproportionately affected minorities and women, particularly during our nation's most recent economic troubles. As the

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[19] See, e.g., 42 U.S.C. §1981 (1981); 42 U.S.C. §1983 (1981); Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1981); Title VII, §701 et. seq. of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq. (1981); Exec. Order 11246, 30 Fed.Reg. 12319 (1965), as amended by Exec. Order 11375, 32 Fed.Reg. 14303 (1967); 42 U.S.C. §6705(f)(2)(1976 ed., Supp.II)(Public Works Employment Act of 1977).

United States Commission on Civil Rights pointed out in its 1977 Report Last Hired, First Fired: Layoffs and Civil Rights, (1977)(hereinafter Last Hired, First Fired):

> The long and extensive use of this policy by employers is one reason why income remains consistently lower and unemployment rates higher for these groups than for the labor force as a whole.

at 1. See Point II, supra.

Review of the impact of the 1974-75 recession on the employment status of minority and women workers highlights the devastating effects which can result from such layoffs. Between the end of 1973 and mid-year 1975, the unemployment rate for adult women rose steadily from 5.9% to 8.5%. Last Hired, First Fired, at 10. Jobless rates reached 14.3% for non-whites, and 12.4% for Hispanic workers by mid-1975, as compared to 8.2% for white work-

ers generally. Id.

Unemployment resulting from layoffs during that time period rose most sharply in those blue collar occupations where minority employees were most likely to be concentrated. Id. While the concentration of women workers in trade and services industries cushioned the impact of layoffs for women employees overall,[20/] nonetheless, women who had broken into traditional male jobs such as the assembly line of automobile plants or as patrol officers on police forces, were heavily affected by job loss. Id. Moreover, in some industries where minorities represented only 10-12% of the workforce, they accounted for 60-70% of those workers laid off in 1974. Id. at 24-25.

[20/] Cyclical changes in employment rates are generally less dramatic in trade and services than in goods-producing industries. Last Hired, First Fired at 11.

The impact of layoffs on government employees has been no less severe. For example, in mid-1975, the New York City Police Department laid off 371 of its 680 police officers, out of a force of almost 26,000. Id. Over half of all Hispanic workers in New York City lost their jobs between 1974 and 1975. Id. More recently, minority workers have accounted for 2335 of the 2944 layoffs of public sector employees ordered in Detroit between 1980-82. Bureau of National Affairs, Layoffs, Rifs, and EEO in the Public Sector: A BNA Special Report

(February 1982), at 23.[21]

In April 1975, the Department of Labor reported that "recently hired work-

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[21] Federal employees have fared no better. In 1981, 11,845 employees of the Federal government were laid off because of budget cuts. Bureau of National Affairs, Layoffs, Rifs, and EEO In The Public Sector: A BNA Special Report, February 13, 1982, p. 5. These layoffs were 50% higher for minority employees than non-minority employees. Id. Among administrative employees, women were laid off at a rate 61% greater than men; minority workers in administrative positions experienced layoffs at a rate 3.5 times the average rate. Id. In the first two quarters of 1982, 5321 federal employees were laid off; nearly 63% of these laid off employees were women, and women and minority men together comprised nearly 80% of the layoffs. Summary of Task Force RIF Survey, Quarter 1 and Quarter 2 Fiscal Year 1982. (Federal Government Service Task Force). In the third quarter of 1982, 1393 federal employees were laid off, 50.6% of whom were women. The combined percentage of women and minorities laid off was 70.9%. Reduction In Force Survey Third Quarter Fiscal Year 1982 (Federal Government Service Task Force).

ers, including many women and minority group members, have become early casualties of the economic downturn." Last Hired, First Fired, supra, p.10. Statistics reflecting the most recent federal layoffs, supra n. 21, demonstrate that the effects of the current recessionary cycle on the employment patterns of women and minorities are similarly disproportionate and injurious. Clearly, if affirmative measures designed to counteract these results are not instituted and adopted, "the opportunities [for women and minorities] laboriously created in the 70's may be destroyed during hard times in the 80's." U.S. Comm'n on Civil Rights, Affirmative Action In the 1980's: Dismantling The Process of Discrimination 36 (1981)(hereinafter Affirmative Action).

Strict adherence to the last hired,

first fired policy of layoffs "locks in" the effects of past discrimination by continuing the advantage white males gained in employment as a direct result of minimal or no competition from women and minorities in the past. Such adherence thus conflicts directly with the explicit intent of Congress in enacting Title VII and its subsequent amendments, to prohibit all forms of employment discrimination, and to provide sweeping remedial authority to the Courts to eradicate all present effects of both present and past discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added),

2. The lower courts' orders properly implemented the policy to remedy the effects of discrimination.

The powers of the district court to fashion a remedy for discrimination are

necessarily broad. "[W]here racial discrimination is concerned, the '[district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as ban like discrimination in the future.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)(quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)). See also Hills v. Gatreaux, 425 U.S. 284 (1976)(power to order metropolitan relief as remedy for unconstitutional housing segregation). In the instant cases, the lower courts entered a series of remedial orders designed to increase the minority representation among the police and firefighters in Boston in order to overcome the continuing effects of past discriminatory hiring practices in which the Boston Police and Fire Depart-

ments were found to have engaged.[22/] The trial court's subsequent modification of those orders to ensure their continuing effectiveness in the face of unexpected layoffs is being challenged here.

There is no question that the district court had inherent power to modify its equitable relief to adapt to new or changed circumstances. United States v. United Shoe Corp., 391 U.S. 244, 251 (1968); System Federation v. Wright, 364 U.S. 642, 647-48 (1961). Proposition 2 1/2 posed an unforeseen threat to the ongoing remedy. Failure to modify the prior remedial orders would allow the "substantial eradication of all progress"

22/ The necessity of orders setting goals for the hiring of minorities and women by employers who have discriminated has been recognized by lower courts consistently throughout the past decade. See, e.g., United States v. City of Miami, 614 F.2d 1322, 1335-36 (5th Cir. 1980), mod. in part on other grounds, 644 F.2d 435 (5th Cir. 1981), and cases cited therein.

achieved in the integration of the police and fire departments. Castro v. Beecher, 522 F.Supp. at 877. The court of appeals endorsed the views of the district court. Boston NAACP, 679 F.2d at 972.

In these circumstances, modification of the district court's prior decrees was appropriate in order to prevent the substantial undoing of the remedy. Brown v. Neeb, 644 F.2d 551, 560 (6th Cir. 1981); Perrotte v. Percy, 489 F.Supp. 212, 214 (E.D. Wisc. 1980); Bolden v. Pennsylvania State Police, 73 F.R.D. 370, 372 (E.D. Pa. 1976), aff'd 578 F.2d 912 (3d Cir. 1978).

The lower courts' decisions represent that "special blend of what is necessary, what is fair, and what is workable," Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), that characterizes equitable remedies. Thus, the order did not prohibit layoffs of sworn personnel altogether. Cf. Schaefer v. Tannian, 538 F.2d 1234

(6th Cir. 1976)(district court improperly enjoined layoff of male police officers; injunction against layoff of female officers was proper). It did not ban the layoff of all minority officers. The order did not require any additional measures of affirmative action, or require that white officers be replaced by new minority hirees. It merely sought to preserve the remedial status quo in the face of an unexpected fiscal exigency,[23/] and did not overbear "the interests of state and local authorities in managing their own affairs ..." Milliken v. Bradley, 433 U.S. 267, 281 (1977).

[23/] Indeed, as the court of appeals concluded, the district court's orders served the pressing public interest of maintaining integrated public safety departments in a major city with a large minority population. Boston NAACP, 679 F.2d at 977-78. Accord, Bridgeport Guardians, Inc. v. Members of the Bridgeport C.S. Comm'n, 482 F.2d 1333, 1341 (2nd Cir. 1973); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

The district court's reasonable modification of its prior orders is not invalid simply because it involved suspending the operation of the state's last-hired, first-fired layoff system, Mass. Anno. Laws ch. 31, §39 (Law. Co-op. 1982) Supp.). The mere existence of a seniority-based lay-off system cannot diminish "the scope of a district court's equitable powers to remedy past wrongs...for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). Nor is the scope of the remedial power under §706(g) of Title VII, 42 U.S.C. §2000e-5(g) (1981), limited or qualified by the Congressional policy expressed in §703(h) of Title VII, 42 U.S.C. §2000e-2(h) (1981), of protecting bona fide seniority systems from attack as discriminatory. Franks v. Bowman Transportation Co.,

424 U.S. 747, 758-59 (1976).

In Franks, this Court made clear that, in cases dealing with seniority systems, there is a significant "difference between a remedy issue and a violation issue," United Air Lines, Inc. v. Evans, 431 U.S. 553, 559 (1977).[24/] The instant cases do not attack the Massachusetts seniority-based plan itself as discriminatory. This clearly distinguishes them from the situation presented in Teamsters v. United States, 431 U.S. 324 (1977). Nor have respondents sought a determination that the Massachusetts layoff statute is invalid,

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[24/] Amici's discussion of Title VII in this section is not intended to imply that the issues addressed are precisely the same in both statutory and constitutional contexts. Rather, because of the explicit Congressional view embodied in §703(h), Title VII presents the strongest example of countervailing forces that could limit the remedial power of the district court. As amici demonstrate, infra, even viewed from the perspective of the policy of Title VII, the district court's orders were proper.

or asked for a remedy that permanently alters seniority.[25] Respondents, as well as the lower courts, focused exclusively on preserving the effectiveness of the remedy for the initial violation, discrimination in hiring. See Franks, 424 U.S. at 758.

The particular remedy crafted by the district court affects only that specific part of the Massachusetts civil service scheme that determines the order of layoffs, Mass. Ann. Laws ch. 31, §39 (Law. Co-op. 1982 Supp.). This circumscribed remedy is not foreclosed by this Court's decisions that have interpreted §703(h). Petitioners' sweeping claims that "employers are...not obliged to modify seniority-based layoff policies," Police Br. at 10, misconstrue both §703(h) and this Court's precedents. As enacted, §703(h) was an

[25] See Discussion at Point I, supra.

expression of federal policy to minimize government interference with the "system of industrial self-government," United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 580 (1960), created through collective bargaining contracts. See also American Tobacco Co. v. Patterson, 71 L.Ed. 2d 748, 760 (1982); Trans World Airlines v. Hardison, 432 U.S. 63, 79 (1977). In many such contracts, seniority plays a central role in the allocation of virtually all employment opportunities and benefits. The seniority systems examined by this Court have been the result of collective bargaining agreements, and typically have been of this all-encompassing variety. For example, the seniority system in Teamsters governed "vacations, pensions, and other fringe benefits," as well as "the order in which employees may bid for particular jobs, are laid off, or are recall-

ed from layoff." 431 U.S. at 343. See also United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 n.5 (1977)(wages, vacations, layoffs, flight assignments); TWA v. Hardison, 532 U.S. at 67 n.1.

By contrast, the layoff provision at issue in these cases is not the result of collective bargaining agreement. Nor is it part of a scheme in which seniority is of "overriding importance," Humphrey v. Moore, 375 U.S. 335, 346 (1964). Major aspects of Massachusetts civil service policy are based on grounds other than seniority. They include promotional examinations for the metropolitan district and capitol police forces (Mass. Ann. Laws ch. 31, §65 (Law. Co-op. 1982 Supp.)); transfers (ch. 31, §§35-36); preferences for disabled veterans (ch. 31, §26); and provisional

appointments (ch. 31, §§12-15).[26/] The Massachusetts statutory scheme, therefore, does not give seniority the central role that it has played in the collective bargaining context that Congress sought to protect by enacting §703(h). The district court, herein, properly acted to preserve the remedy of racially integrated police and fire services.

3. Courts must be free to impose affirmative color-conscious or gender-conscious remedies if they are to fully effectuate the broad public policy against employment discrimination.

In deciding that under §706(g) the provision of retroactive seniority was

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[26/] Even in those areas other than order of layoff where the statutory scheme uses seniority, it is not absolute, e.g. promotions to the next higher title in the same departmental unit, ch. 31 §8 (appointing authority may pick from among the three most senior qualified applicants).

"generally appropriate" as a remedy for hiring discrimination, Franks, 424 U.S. at 779, this Court carefully considered the effect of the remedy on other employees. It found "untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." 424 U.S. at 775. The Court recognized that retroactive seniority could affect the expectations and prospects of other employees, but concluded that the importance of the remedy was paramount. 424 U.S. at 777-78.

The result of the remedy approved in Franks is that white male workers who have been on the job for some time may find themselves, in hard times, losing economic benefits, or even being laid off, as a result of the seniority-based relief ordered. In the instant cases, the more senior white workers suffered the same

consequences as the Franks workers would have, had layoffs been required following the award of retroactive seniority. There can be no principled distinction drawn with respect to the consequences to white workers between the order in Franks and the order of the district court here.[27/]

Moreover, the fact that some individual white males may be disadvantaged by a court-ordered temporary bypass of strict seniority in times of layoffs should not preclude this Court from authorizing such affirmative relief. Affirmative measures and affirmative action plans which specifically provide for preferential treatment of victims of past discrimination are too deeply ingrained in established civil

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27/ Indeed, as noted in Point III.B.2. supra, the district court's order had less sweeping consequences. It affected only order of layoff, and not any of the other elements of employment that are affected by seniority.

rights law to be abandoned now. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980). For this Court to allow its determination of an appropriate remedy to be governed by the expectations of the individual white male officers laid off below, see Franks, 424 U.S. at 114, is to ignore the overall fairness of the plan, the actual discrimination experienced by minority officers, and the fact that affirmative measures "often produce changes in our institutions that are beneficial to everyone, including white males." Affirmative Action at 36.

Nor should this Court be troubled by assertions of "reverse discrimination" by opponents of such affirmative remedies. Such charges are mere smokescreens designed to undermine full and effective enforcement

of congressional intent to end race and sex discrimination in employment: "[T]he charge of 'reverse discrimination', in essence, equates efforts to dismantle the process of discrimination with that process itself. Such an equation is profoundly and fundamentally incorrect." Affirmative Action, at 41.

Adherents of color-blind or gender-neutral solutions to discrimination "[ignore] the context in which the problem of inequality has persisted in this country.. .." Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 214 (1980)(hereinafter Wright). Discrimination in employment cannot be equated solely with individual prejudice or expressions of bias. Affirmative Action, supra, at 2. Discrimination is "an interlocking process involving the attitudes and actions of individuals and the organi-

zations and social structures that guide individual behavior." Id. at 13. Though perhaps overtly racist, sexist, or bigoted, "they subordinate, exclude, segregate and deny equal opportunity almost as effectively as overt racist, sexist, and bigoted behavior." Id. at 2. "When these processes are at work anti-discrimination remedies that insist on 'color-blindness' and 'gender-neutrality' are insufficient." Id.

Moreover, it is clear that Congress, in enacting anti-discrimination legislation has rejected a "color-blind" or "gender-neutral" theory of government, and directed government to employ its power to eradicate it. As Judge Skelly Wright has emphatically remarked, "to call such legislation 'color-blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help." Wright, at 220-21.

Decisions of this Court demonstrate its agreement with, and adherence to, the principles outlined above. As Justice Blackmun stated in his opinion in Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978), "[i]n order to get beyond racism, we must first take account of race... And in order to treat persons equally, we must treat them differently. We cannot--we dare not--let the equal protection clause perpetuate racial supremacy." Likewise, in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Justice Brennan refused to adopt a literal interpretation of §§703(a) and (d) of Title VII, which would have necessarily prohibited all race-conscious affirmative action plans:

> The prohibition against racial discrimination in §§703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose... Examination of those sources makes clear

> that an interpretation of the sections that forbade all race-conscious affirmative action 'would bring about an end completely at variance with the purpose of the statute' and must be rejected.... (citations omitted)

See also Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding as constitutional a provision of the Public Works Employment Act of 1977 that required state or local governments to use 10% of federal funds granted for public works contracts to procure services or supplies from minority-owned or controlled businesses).

In the difficult economic circumstances we now face, the teachings of this Court's cases on the importance of remedying discrimination must not be forgotten.

> In this charged atmosphere, there is a strong temptation to view affirmative action as pitting the rights of minorities and women against white males in a battle over diminishing resources. The challenge, however, is to maintain, indeed, to advance our commitment to equality without asserting one equity over another.

Affirmative Action, at 6.

CONCLUSION

Because the cases before the Court no longer present any live controversy, they should be dismissed as moot. If the cases are found not to be moot, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DESCRIPTIONS OF AMICI CURIAE

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibit-

ing employment discrimination.

Equal Rights Advocates, Inc. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as amicus, in numerous employment discrimination cases.

The League of Women Voters of the United States is a nonpartisan, nonprofit membership organization, incorpo-

rated under the laws of the District of Columbia, with a current membership of 110,000 in 1400 state and local Leagues located in all states, the District of Columbia, Puerto Rico, and the Virgin Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination, and is committed to the eradication of discrimination against minorities and women through affirmative action.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center represents women's concerns before feder-

al administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Women Employed is a Chicago based organization with a membership of 3,000 women workers. Over the past nine years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

The Women's Division of the National Bar Association is an organization of over 3000 minority women lawyers, legislators, judges, and counselors. It has

as one of its purposes the enhancement and protection of the economic interest of minority women. It endorses the use of affirmative action plans as a viable means of correcting past discrimination and moving minority women up from the bottom rung of the economic ladder.

Women's Equity Action League is a national nonprofit membership organization dedicated to securing the legal and economic rights of women. The effective enforcement of civil rights laws has been a major priority of WEAL since its founding in 1968, particularly with respect to the remedy of employment discrimination through affirmative action.

Women's Legal Defense Fund is a nonprofit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been

discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.